MAHINDAR SINGH

v.

AMANAH SAHAM PAHANG BHD. & ANOR.

HIGH COURT MALAYA, KUANTAN
VC GEORGE J
[CIVIL SUIT NO. 343]
APRIL 1983

CIVIL PROCEDURE: *Judgment in default - Application to set aside - Memorandum of appearance already posted - Bona fide defence - Solicitors appointed by insurers - Whether could act for defendants - Payment into Court - Effect - Affidavits in support of application - Not by persons with personal knowledge - Source of information not disclosed - Whether affidavits proper - Notice served on insurers - Whether binding on defendants - Final judgment - Whether regular - Meaning of "debt or liquidated demand".*

The plaintiff's motor car was damaged by the defendants' motor car running into the rear of it and pushing it into a vehicle in front of it. A writ was served on the defendants and on 22 December 1982 notice was given to the insurers of the commencement of legal proceedings. On a certificate of non-appearance being issued, judgment in default was granted to the plaintiff on 31 January 1983. Syarikat Richard Ho, advocates and solicitors purporting to act for the defendants, applied to set aside the default judgment on the ground that memorandum of appearance on behalf of the defendants had been posted to the Registry of the Court on 26 January 1983 and that the draft statement of defence disclosed a *bona fide* defence to the action. The plaintiff on his part contended, *inter alia*, that the solicitors who had acted in the proceedings appeared to be instructed by the insurers of the defendants' motor car and not by the defendants themselves and that by paying the full amount of the judgment sum into Court, the defendants can be inferred to have agreed to abide by the judgment entered against them.

Held:

[1] Though the appointment of Syarikat Richard Ho might have been by the insurers, it was made on behalf of the defendants and the steps taken by the solicitors in the action were taken on behalf of the defendants and on instructions given on their behalf. It is common knowledge that by the terms of their motor insurance policy the insured have delegated the power of appointment of solicitors in respect of their claims covered by the policy to their insurers.

[2] The judgment sum paid into Court did not give rise to the inference that the defendants would abide by the judgment.

[3] The affidavits filed in support of the application to set aside the default judgment were proper in the circumstances of the case though not made by persons having personal knowledge of the facts alleged and though the source of information was not disclosed.

[4] The fact that notice had been served on the insurers was not relevant as the application to set aside was or appeared to be by the defendants.

[5] The final judgment was irregular. Most of the items claimed as special damages were losses, and damages that had to be proved. The words "debt or liquidated demand" do not extend to unliquidated damages even though the amount of such damages be named at a definite figure. (*Knight v. Abbott* 10 QBD 11).

[6] An acceptable explanation for the non-appearance had been given.

[7] The draft statement of defence disclosed a defence. The allegation of contributory negligence by itself is an arguable or triable issue (*Burns v. Kondal* [1971] 1 Lloyds LR 554).

[Default judgment set aside.]

Case referred to:
Burns v. Kondal [1971] 1 Lloyd's LR 554

Other sources referred to:
The Supreme Court Practice [1979] para. 6/2/4A.

For the plaintiff - S. Sivasubramanian; M/s. S. Sivasubramanian
For the defendants - Guy Vareghese; Syarikat Richard Ho

JUDGMENT

VC George J:

On the 11 September 1981 the defendants' motor car CM 5905 ran into the rear of the plaintiff's motor car CE 10, the force of the collision causing it to be pushed into the rear of another vehicle CP 2277 which had been in front of the plaintiff's motor car. The plaintiffs motor car was damaged.

By his solicitors' letter of 22 December 1982 the plaintiff gave notice to M/s. Malaysia Pacific Insurance Co. Ltd., the insurers of the defendants' motor car, of the fact of the accident and of the commencement of legal proceedings against the owner and driver of the motor car CM 5905.

The insurance company was asked to name solicitors (if any) that would accept service of the writ to be issued against the said owner and driver. There was no reply to this letter.

The writ was caused to be issued on 30 December 1982 and on the 19 January 1983 the writ was served on the said owner and driver who are the defendants named in the writ.

On the 31 January 1983 a certificate of non-appearance in respect of each of the defendants was issued by the Court and Judgment in default against each of the defendants for the amount, interest and costs prayed for in the statement of claim endorsed to the writ was entered on the 31 January 1983.

By their letter of 2 February 1983 the plaintiff's solicitors demanded from the owner of CM 5905 payment of the judgment sums.

By their letter of 18 February 1983 Syarikat Richard Ho, Advocates & Solicitors of Kuala Lumpur purporting to act for the defendants sent in their application to set aside the default judgment. The affidavits filed in support of the application are by Encik Guy Vareghese, a member of the firm of solicitors and by one Encik Eric Wong, the Claims' Manager of Malaysia Pacific Insurance Co. Bhd. the insurers of the defendants' motor car CM 5905. By the affidavits it is claimed that:

(1) On 26 January 1983 the Solicitors had posted to the Registry of the Court the memorandum of appearance on behalf of each of the defendants.

(2) The draft statement of defence attached to the affidavit of Eric Wong discloses that there is *bona fide* defence to the action that is that the accident was caused by the negligence of the plaintiff or was substantially contributed to by him (particulars of negligence are given). The allegations of loss and damage are denied.

(3) In any event the amount claimed is not a debt or liquidated claim and accordingly the final judgment entered was irregular.

On behalf of the plaintiff this application was attacked on a number of grounds:

(1) The solicitors who purported to enter the appearance and who filed the application to set aside the writ appear to be instructed by the insurers of the defendant's motor car and not by the defendants themselves.

(2) The defendants have paid the full amount of the judgment sum into Court. From this the Court should infer that the defendants abide by the judgment entered against them.

(3) The affidavits filed in support of the application are not by the defendants or either of them.

(4) The insurers had been given notice as early as 22 December 1982 of the commencement of legal proceedings.

(5) There is no defence to the action in that on the facts the defendants were solely to blame for the accident occurring.

(6) The final judgment entered was regularly obtained, the amount being a liquidated demand.

It is common knowledge that by the terms of their motor insurance policy the insured have delegated the power of appointment of solicitors in respect of claims covered by the policy to their insurers.

In the instant case the defendants passed on the writ served on them to the insurers and thereby in effect they were requiring the insurers to take such steps as the insurers may decide on behalf of the defendants. The appointment of Syarikat Richard Ho may have been made by the insurers but I am satisfied that such appointment was made on behalf of the defendants and that the steps taken by Syarikat Richard Ho in the action were taken on behalf of the defendants and on the instructions given to them on behalf of the defendants.

The circumstances in which the judgment sum was paid into Court by the defendants does not give rise to the inference that the defendants abide by the judgment. It is clear that the amount was paid in to avoid the ignominy of the execution proceedings commenced by the plaintiff on 9 March, 1983.

It was submitted that the affidavits filed in support of the application should have been made by persons having personal knowledge of the facts alleged and where statements of information or belief are given the source of the information should be disclosed. I entirely agree. However, it seems to me that the affidavits filed in support of the application do not offend against those rules. The affidavit by Encik Guy Vareghese explains the delay in the memorandum of appearance reaching the Registry of the Court. Encik Eric Wong deposes to the fact that the defendants' solicitors had advised him that the defendants have a good defence to the action and exhibits the draft statement of defence which I have to assume was settled on the instructions of the defendants or their agents.

That the insurers had been given notice of commencement of proceedings on or about 22 December 1982 is not relevant where the application to set aside the judgment is by the defendants which on the face of it is the case here.

Was the RM28,814.04 claimed as special damages a liquidated demand?

A liquidated demand is in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a `debt or liquidated demand', but constitutes 'damages'.

The words "debt or liquidated demand" do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure (*Knight v. Abbot* 10 QBD 11). The Supreme Court Practice 1979 Vol. para 6/2/4A.

To my mind many of the items that made up the RM28,814.04 call for investigations beyond mere calculation and accordingly are not debts or liquidated demands but damages. The Senior Assistant Registrar when faced with the requirement that default judgment be entered had to decide on whether the items claimed were debts or liquidated demands on the face of the statement of claim. Applying the test suggested in the quotation from the White Book, he should have held that the claim for costs of repairs calls for an investigation as to whether the repairs were necessitated by the accident. In the absence of explanations the costs of hiring taxi for 3 persons called for investigation as did the claim for "travelling to Kuala Lumpur on 2 occasions". The issue would have been why 3 persons and why travel to Kuala Lumpur on 2 occasions. As to wages paid to a driver for 127 days, there is no averment of there being a paid driver and why 127 days. There was no averment that the plaintiff's motor car could not be used and the significance of the 127 days and 125 days, the significance of the payment of hire purchase, the difference between the price of diesel oil and petrol are on the face of the statement of claim, meaningless and called for investigation on the part of the Senior Assistant Registrar. On the plaintiff being without a car for 57 days at RM200 per day similarly call for an investigation as to why it was 57 days, why the plaintiff was without a car and why the amount of RM200 was asked for.

In short to my mind most of the items claimed as special damages are what they are alleged to be in paragraph 5 of the statement of claim i.e. losses and damages that have to be proved.

It seems to me that the plaintiff in causing the writ to issue must have realised this as the indorsement required by O. 6 r. 2(b) in the case of claims for a debt or liquidated demand was not made on the writ.

In my judgment an acceptable explanation for appearance not having been entered before default judgment was entered has been given. The memorandum of appearance enclosed with the letter of the solicitors dated 26 January 1983 was received by the Court on 5 February 1983.

The draft statement of defence does disclose a defence - the allegation of contributory negligence alone is an arguable or triable issue - *Burns v. Kondal* [1971] 1 Lloyd's LR 554. No good reason to shut out the defendants have been put forward.

In any event, the final judgment given by the Court was irregular in that most of the items claimed cannot be said to be a debt or liquidated demands.

The judgment in default of appearance entered on the 31 January 1983 is set aside. The defendants are given leave to enter an appearance within 8 days of the date hereof.

The defendants should have been more vigilant than they were and the plaintiff should not have sought to enter final judgment as he did. Each party will bear its own cost of this application.

There will be an order in those terms.

Also found at [1984] 1 CLJ 181